IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14427 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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LALBHAI TRADING COMPANY THROUGH BK BHATT & 3 - Petitioner(s)

Versus

UNION OF INDIA & 3 - Respondent(s)

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Appearance :
MR RAKESH GUPTA FOR M/S TRIVEDI & GUPTA for Petitioner(s) : 1 - 4.
MR JITENDRA MALKAN for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2 - 3.
NOTICE UNSERVED for Respondent(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 25/11/2005

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 This petition primarily challenges the order in appeal made by the Commissioner of Customs (Appeals) on 6/6/2005 (Annexure-A) under Article 226 of the Constitution of India. The petitioner has prayed for the following reliefs :

A) YOUR LORDSHIPS may be pleased to admit and allow the present petition;

B) YOUR LORDSHIPS may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ or order holding and declaring that the impugned order (Annexure-A) is violative of principles of natural justice and are also violative of Articles 14, 19(1)(g);

C) YOUR LORDSHIPS may be pleased to issue a writ of mandamus or a writ in the nature

of mandamus or any other appropriate writ or order holding and declaring that the impugned notices (Annexure-B) are violative of principles of natural justice and also violative of Articles 14, 19(1)(g) and 300A of the Constitution of India and they are also irrational, oppressive, without application of mind and arbitrary besides being contrary to or in non-compliance of and/or disregard to the provisions under the Customs Act,1962;

D) YOUR LORDSHIPS may be pleased to issue a writ of mandamus or certiorari or a writ in the nature of mandamus or certiorari or any other appropriate writ or order quashing and setting aside the impugned order issued on 6/6/1995 in Appeal No. 55/2005 (Annexure A) and the impugned notices (Annexure B colly.) i.e. the notices dated 23.7.2004, 12.8.2004, 21.8.2004, 27.8.2004, 22.9.2004 and 19.11.2004 and also quash the direction to the petitioners to get the alleged dues deposited on priority basis failing which proceedings may be initiated against the noticee;

E) Pending hearing and final disposal of

present petition, YOUR LORDSHIPS may be pleased to pass appropriate writ, order or direction, as and by way of interim relief, staying the implementation, execution and operation of the impugned order issued on 6.6.2005 in Appeal No.55/2005 (Annexure A) and also of the impugned notices dated 23.7.2004, 12.8.2004, 21.8.2004, 27.8.2004, 22.9.2004 and 19.11.2004 (Annexure B colly) and restraining the respondents their officers and agents from acting on the basis of or in pursuance of the impugned order and/or impugned notices and/or the final assessment order dated 14.5.2001 and from taking any action including any coercive action in any manner whatsoever for recovering the dues of the said importer-owner;

F) An ex parte ad interim relief in terms of Para 9(E) above may kindly be granted;

G) Any other and further relief/s as may be required in the facts and circumstances of case may also be granted.

2 The petitioner, a partnership firm, at the

relevant point of time, was carrying on business of the Custom House Agent and in the course of the said business acted in that capacity for respondent No.4 i.e. *M/s.Golden Plastics Company (importer).* The said concern i.e. *Golden Plastics Company* imported certain goods known as HDPE and filed Bill of Entry No.17/95. The importer was permitted to clear goods on provisional basis after provisional assessment was framed. Pending final assessment the importer owner was called upon to submit a bond as per provisions contained in Section 18 of the Customs Act,1962 (the Act) read with rules 2 & 3 of the Customs (Provisional Duty Assessment) Regulations,1963. On 18/2/1995 the said importer owner submitted the bond. The goods were provisionally cleared on 6/6/1995. Thereafter, the Order-in-Original i.e. Final Assessment Order was framed exparte on 14/5/2001 and the importer directed to discharge the liability amounting to Rs.35,09,317/- along

with interest thereon.

3 The petitioner was served with notices dated 23/7/2004 and 12/8/2004. The stand of the respondent authority is that the petitioner had acted as a surety and on failure of the importer to discharge the liability, the petitioner must pay up the outstanding dues. The petitioner therefore wrote on 20/8/2004 and 24/8/2004 informing the authorities that it was not having any records with it and requested for the entire correspondence etc. However, the respondent authorities further served notices on 27/8/2004, 22/9/2004 and 19/11/2004 calling upon the petitioner to discharge the liability arising in light of Order-in-Original No.43/AC/ICD/2001 dated 14/5/2001. The petitioner was also informed that in the event of non payment of dues by the importer the petitioner should either recover the amount from the importer or it should itself pay

the demanded amount failing which the licence of the petitioner as Custom House Agent would be suspended/revoked.

4 The petitioner therefore approached this Court by way of Special Civil Application No. 36 of 2005 which came to be decided on 1.4.2005. The petition came to be disposed of by a judgment and order dated 1.4.2005 and in paragraph No.5 it was laid down by this Court as under :

> “5. As can be seen from the facts on record, the petitioner was under a bona fide impression that it was not required to challenge the order dated 14th May 2001 made against and in the name of the importer Company, and it was only when the petitioner company was served with the impugned show cause notices for recovery of the outstanding dues that it became alive to the fact that the importer Company has not challenged the said

order. Thereafter, the present petition had been filed. In these circumstances, as the petitioner was under a bona fide impression and was bonafide litigating by way of challenging the impugned show cause notices, it would be in the fitness of things if the petitioner is permitted to avail of an alternative remedy of appeal, subject to the following directions :

(i) The petitioner shall prefer the necessary appeal within a period of two weeks from today.

(ii) In the event, such an appeal is filed on or before 16th April 2005, the Commissioner (Appeals) shall treat the same as having been filed within the period of limitation and shall decide the same on merits in accordance with law".

5 The petitioner preferred appeal on 11/4/2005

which came to be registered as Appeal No.55 of 2005 and by impugned order dated 6/6/2005 Commissioner (Appeals) has dismissed the appeal by holding that the petitioner was not an 'aggrieved person' who is statutorily empowered to file an appeal u/s. 128 of the Act. That the liability of the petitioner, if at all there was any, was limited as a surety to the bond. Hence, if at all the appellant was aggrieved, it was against the enforcement of the bond and not against the impugned Order-in-Original.

6 Mr.Rakesh Gupta appearing on behalf of the petitioner submitted that the reliance on the decision of the Apex Court in the case of *Northern Plastics Ltd. Vs. Hindustan Photo Films Mfg.Co. Ltd., 1997(91) E.L.T.502 (S.C.)* by Commissioner (Appeals) was misplaced. That the said decision in fact was required to be pressed into service to hold that the petitioner was

'person aggrieved'. That in case it was to be held that the petitioner was not affected by Order-in-Original dated 14/5/2001 (Annexure-E) there was no occasion to serve the said order on the petitioner. That by virtue of the liability arising under the said order the petitioner was called upon to discharge the same as per bond invoked against the petitioner as a surety. In the event of the petitioner not being permitted to challenge the Order-in-Original, by way of an appeal, the petitioner was left without any remedy and would sustain an injury because the duty was demanded despite the fact that on merits the order was not justified in law. In support of the submissions made reliance has been placed on decision in case of *Gopabandhu Biswal Vs.Krishna Chandra Mohanty, AIR 1998 SC 1872* and in case of Shobha Suresh Jumani, AIR 2001 SC 2288. He has also referred to the meaning of the words 'aggrieved person' as given in BLACK'S LAW

DICTIONARY (SIXTH EDITION) as well as K.J.AIYAR'S JUDICIAL DICTIONARY, TWELFTH EDITION.

7 Mr.Jitendra Malkan appearing on behalf of the respondent authorities has supported the order made by Commissioner (Appeals) and submitted that the same was proper, legal and reasoned. That, in fact the petition should not be entertained because on the same subject matter an earlier petition had been filed being Special Civil Application No.36 of 2005 and the impugned notices, which have been challenged, had been considered by the High Court while disposing of the earlier petition vide order dated 1.4.2005. That the petitioner had been called upon to make payment in the capacity as a surety and was legally bound by virtue of the bond executed (Annexure D).

7.1 Alternatively, it was submitted that the

order made by Commissioner (Appeals) was an appealable order in terms of Section 129A of the Act, and therefore also the petition was not maintainable. It was further submitted that notices having been issued u/s.142 of the Act were only in recovery proceedings and were not part of adjudication process. Thus, there was no requirement to observe principles of natural justice. Referring to communication dated 27/9/2004 (Annexure K) it was submitted that the petitioner had nowhere disputed its liability as a surety, but had in fact sought time of two to three months for locating the importer and getting the liability discharged. He relied upon paragraph No.9 of the Apex Court decision in case of *Northern Plastics Limited (supra)*.

8 Mr.Gupta, in rejoinder submitted that in the first instance the petitioner disputed having executed any bond as a surety and as could be

seen from copy of the bond (Annexure D) the same had been signed by two persons only as witnesses, that the petitioner firm had not executed the bond. He submitted that the original was in possession of the respondent authorities and if necessary, the Court may call upon the respondent authorities to produce the original.

9 At this stage, the matter was kept part-heard on 17/8/2005 and the Counsel for the respondents was directed to produce the original record including the original register. On 18/8/2005 original register was produced and it was found that there were various discrepancies qua the serial numbers and the dates mentioned in the register and those appearing on the original bonds which were produced for perusal and verification. Therefore, the respondent authorities were directed to tender the explanation by way of affidavit of the person

concerned i.e. person in charge of maintaining register as to in what circumstances the discrepancies appeared in recording the serial numbers and the dates in the register and on the original bonds. At the request of the Counsel the matter was adjourned to 22/8/2005 to take the explanation on record despite the fact that the hearing was completed.

10 On the said day viz. 22/8/2005 the respondent authorities, through their Counsel, produced one more original register with the explanation that the original register produced on 18/8/2005 pertained to Provisional Assessments and the P.D. Bond register in original was produced on 22/8/2005. On perusal it was found that no discrepancy existed and hence the explanation tendered by the respondent authorities was accepted.

11 It is necessary to record that on 18/8/2005 the respondent sought to tender affidavits of various persons in support of the submission that the P.D. Bond was enforceable against the petitioner. However, the Court declined to take the said affidavits on record in light of the fact that the hearing was over and the matter had been kept part-heard only for the limited purpose of ascertainment of the original record. It is also necessary to note that the respondent authorities had already submitted affidavit-in-reply dated 1/8/2005 and as the pleadings were complete, with the consent of the parties while admitting the petition rule had been made returnable on 17/8/2005 vide order dated 5/8/2005. Accordingly the matter was finally heard on 17/8/2005 and 18/8/2005.

12 As can be seen from the pleadings and the contentions raised at the time of hearing the

dispute between the parties centres round the fact as to whether the petitioner had, or had not, executed bond of surety in relation to Bill of Entry No.17/95. The petitioner has also raised the issue as to the validity of the Order-in-Original on merits. However, for the reasons that appear hereinafter, the Court has not found it necessary to enter into any discussions on merits. The principal question which falls for determination is whether the petitioner can be said to be an 'aggrieved person'.

13 The concept of 'aggrieved person' has come up time and again and the legal position may be set out.

AGGRIEVED PERSON : LEGAL POSITION.

(i) *(1975) 2 SCC 702 - Bar Council of Maharashtra Vs. M.V.Dabholkar And others.*

In a case where a question arose before the Constitutional Bench of the Supreme Court as to

whether the Bar Council could be termed to be 'aggrieved person', the following legal principles have been enunciated :

> “27. The words 'person aggrieved' are found in several statutes. The meaning of the words 'person aggrieved' will have to be ascertained with reference to the purpose and the provisions of the statute. Sometimes, it is said that the words 'person aggrieved' correspond to the requirement of locus standi which arises in relation to judicial remedies.
>
> 28. Where a right of appeal to courts against an administrative or judicial decision is created by statute, the right is invariably confined to a person aggrieved or a person who claims to be aggrieved. The meaning of the words 'a person aggrieved' may vary according to the context of the statute. One of the meanings is that a

person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one 'a person aggrieved'. Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words 'a person aggrieved' is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality xxxx”

(ii) *AIR 1976 SC 578 - Jasbhai Motibhai Desai Vs. Roshan Kumar and others.*

The Apex Court was called upon to decide as to whether Cinema Theater Licence Holder was entitled to invoke certiorari jurisdiction against the competitor who was awarded No Objection Certificate under the relevant rule of the Bombay Cinema Rules,1954. At page 581 in paragraph No.12 it was laid down,

> " xxx xxx xxx Who is an 'aggrieved person'? And what are the qualifications requisite for such a status ? The expression 'aggrieved person' denotes an elastic, and, to an extent, an elusive concept. It cannot be confined within the bounds of a rigid exact and comprehensive definition. At best, its features can be described in a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the

prejudice or injury suffered by him. Xxx xxx xxxx”

Further at page No.583 in paragraph Nos. 23 to 25 the ratio of English decisions regarding 'locus standi' has been explained thus :

“23. In Regina v. Liverpool Corporation , Ex parte Liverpool Taxi Fleet Operators' Association, (1972) 2 Q.B. 299 the City Council in exercise of its powers under the Town Police Clauses Act,1847, limited the number of licenses to be issued for hackney carriages to 300. The Council gave an undertaking to the associations representing the 300 existing license holders not to increase the number of such license holders above 300 for a certain period. The Council, disregarding this undertaking, resolved to increase the number. An Association representing the existing license-holders moved the Queens' Bench for

leave to apply for orders of Prohibition, Mandamus and Certiorari. The Division Bench refused. In the Court of Appeal, allowing the Association's appeal, Lord Denning M.R. observed at pp.308,309 :

'The Taxicab Owners' Association come to this Court for relief and I think we should give it to them. The writs of prohibition and certiorari lie on behalf of any person who is a 'person aggrieved' and that includes any person whose interests may be prejudicially affected by what is taking place. It does not include a mere busybody who is interfering in things which do not concern him : but it includes any person who has a genuine grievance because something has been done or may be done which affects him : See Attorney General of the Gambia v. N' Jie, (1961) AC 617 and Maurice v. London County Council, (1964) 2 QB 362, 378. The Taxicab Owners' Association here have certainly a locus standi to apply

for relief'.

24. It may be noted that in this case, the whole question turned on the effect in law of the undertaking, and whether the applicants had been treated fairly.

25. Emphasizing the 'very special circumstances' of the case, the court read into the statute, a duty to act fairly in accordance with the principles of natural justice. Thus, a corresponding right to be treated fairly was also imported by implication, in favour of the applicants. Viewed from this standpoint, the applicants had an interest recognised in law, which was adversely affected by the impugned action. They had suffered a wrong as a result of the unfair treatment on the part of the corporation".

At page 584 the following classic excerpt

from the observations of James LJ in Re Sidebothem, (1880) 14 Ch D.458 at p.465 has been extracted :

> “The words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something”.

Finally in paragraph No.38 at page 586 the Apex Court has laid down the broad tests in the following words:

> “38. To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made

above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are : Whether the applicant is a person whose legal right has been infringed ? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of ? Is he a person who has suffered a legal grievance, a person 'against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something? Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public ? Was he entitled to object and be heard by the

> authority before it took the impugned action? If so, was he prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words 'person aggrieved' is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community ? Or is it a statute dealing with private rights of particular individuals?"

(iii) *AIR 1998 S.C. 1872 - Gopabandhu Biswal Vs. Krishna Chandra Mohanty and others.*

In a case under the service law dealing with provisions of Administrative Tribunals Act,1985 as well as Order 47 Rule 1 of the Code of Civil Procedure it was observed in Paragraph No.13 as under :

> “13. xxx xxx xxxx However, leniently one may construe the term 'party aggrieved', a person not directly affected cannot be so considered. Xxx xxx xxxx Only persons who are directly and immediately affected by the impugned order can be considered as 'parties aggrieved' under Section 22(3)(f) read with Order 47 Rule 1.”

(iv) *AIR 2001 S.C. 2288 – Shobha Suresh Jumani Vs. Appellate Tribunal , Forfeited Property and Another.*

In a decision rendered under Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, it was laid down by the Apex Court in paragraph No.5 of the Judgment as under :

> “5. First we would reiterate that the words 'any aggrieved person' are found in several statutes. However, the meaning of the

expression 'aggrieved' may vary according to the context of the enactment in which it appears and all the circumstances xxx xxx"

Thereafter, after reproducing the extract from the case of Sidebotham it is stated that :

"6. The said passage was referred to and relied upon by this Court in Thammanna v. K. Veera Reddy, (1980) 4 SCC 62 : (AIR 1981 SC 116) and Northern Plastics Ltd. v. Hindustan Photo Films Mfg.Co.Ltd.,(1997) 4 SCC 452".

"9. From the aforesaid scheme of the Act, 'any person aggrieved' by an order of the competent authority would mean person whose property is held to be illegally acquired under the Act and which is to be forfeited or whose legal rights qua the said property are adversely affected. According to Black's

Law Dictionary, 'aggrieved party' refers to a party whose personal, pecuniary or property rights have been adversely affected by another person's actions or by a Court's decree or judgment – Also termed party aggrieved; person aggrieved'. Therefore, a relative or associate, who has no interest or rights in such property cannot be held to be a person aggrieved. It is true that wife may be aggrieved because her husband's properties are forfeited. But that would not confer a right to file an appeal against such order. There is no infringement of her legal right. For the purposes of the Act husband and wife are different entities. If the properties standing in the name of relative or associate are forfeited on the ground that smugglers or foreign exchange manipulators were holding the said properties in their names or that such properties are legally acquired, then to that extent, for

challenging the said finding, the relative or associate can be held to be person aggrieved by the order of the competent authority. But, a relative or associate cannot be considered to be aggrieved if the properties belonging to the smuggler or Foreign Exchange manipulator are forfeited under the Act".

The earlier part of the aforesaid paragraph was relied upon on behalf of the petitioner while the later portion was relied upon on behalf of the respondents.

(v) *AIR 2003 S.C. 1989 – Bansari and others Vs. Ram Phal.*

In context of a suit for specific performance the following observations have been made by the Apex Court in light of provisions of Sections 96 & 100 of the Code of Civil Procedure :

“8. Sections 96 and 100 of the CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. See Phoolchand and another v. Gopal Lal, 1967(3) SCR 153; Smt.Jatan Kanwar Golcha v. M/s.Golcha Properties (P.) Ltd., 1970(3) SCC 573; Smt. Ganga Bai v. Vijay Kumar and others, (1974) 2 SCC 393. No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 of the CPC provide for an appeal against decree and not against judgment”.

(vi) *Northern Plastics Ltd. Vs. Hindustan Photo Films Mfg. Co. Ltd., 1997(91) E.L.T.502 (S.C.).*

The Apex Court was called upon to decide as to whether within the meaning of Sections 128 & 129A of the Act and Sections 35 and 35B of the Central Excise Act,1944 a business competitor as well as Union of India could be termed to be a 'person aggrieved' so as to entitle them to file appeals before the Customs, Excise and Gold (Control) Appellate Tribunal (as it was then known). It is stated by the Supreme Court that the decision is confined to the limited question whether appeals moved by the aforesaid two parties before the Tribunal were maintainable or not. The wider concept of locus standi in public interest litigation cannot be imported for deciding the right of appeal provided under the statutory provisions. In paragraph No.10 it is observed :

"xxx xxx xxxx It is axiomatic that the importer against whom the Collector has passed the impugned order of adjudication and who is called upon to pay the customs duty which, according to him, is not payable is certainly an 'aggrieved person' who can prefer an appeal under Section 129A(1) of the Act". xxx xxx xxx Neither the Central Government, through Industries Department, nor the rival company or industry operating in the same field as the importer can as a matter of right prefer an appeal as 'person aggrieved'. It is true that the phrase 'person aggrieved' is wider than the phrase 'party aggrieved'. xxx xxx xxxx It is easy to visualize that even a third party may get legitimately aggrieved by the order of the Collector of Customs being the adjudicating authority if it is contended by such a third party that the goods imported really belonged to it and not to the

purported importer or that he had financed the same and, therefore, in substance he was interested in the goods and consequently the release order in favour of the purported importer was prone to create a legal injury to such a third party which is not actually arraigned as a party before the adjudicating authority and was not heard by it. Under such circumstances such a third party might perhaps be treated to be legally aggrieved by the order of the Collector of Customs as an adjudicating authority and may legitimately prefer an appeal to the CEGAT as a 'person aggrieved'. That is the reason why the Legislature in its wisdom has used the phrase 'any person aggrieved' by the order of the Collector of Customs as adjudicating authority in Section 129A(1). But in order to earn a locus standi as 'person aggrieved' other than the arraigned party before the Collector of Customs as an adjudicating authority it must be shown that such a person

> aggrieved being third party has a direct legal interest in the goods involved in the adjudication process. It cannot be a general public interest or interest of a business rival as is being projected by the contesting respondents before us. Xx xx xxx Generally speaking, a person can be said to be aggrieved by an order which is to his detriment, pecuniary of otherwise or causes him some prejudice in some form or other. A person who is not a party to a litigation has no right to appeal merely because the judgment or order contains some adverse remarks against him".

14 On a conspectus of the aforesaid case law it becomes clear that the words "person aggrieved" are required to be ascertained with reference to the purpose of the provisions of the statute in which they occur. The meaning may vary according to the context of the statute. However, one thing is certain, a person can be said to be

aggrieved if a legal burden is imposed on him which may be in the form of being denied or deprived of something to which such person is legally entitled.

[a] The meaning of the words 'aggrieved person' cannot be read as an expression which is rigid, exact and comprehensive. Apart from the content and intent of the statute, the specific circumstances of the case, the nature and extent of the person's interest, and the nature and extent of the prejudice or injury suffered by the person are relevant factors.

[b] The duty of the Court is to read into the statute, a duty to act fairly in accordance with the principles of natural justice. If a person suffers a wrong as a result of unfair treatment on the part of

the authority, he is a person who has suffered a legal grievance, against whom a decision has been pronounced which decision has either wrongfully deprived him or wrongfully refused him something or wrongfully affected his title to something. In other words, the person must have suffered a legal wrong or injury, in the sense, that his interest is prejudicially and directly affected by the act or omission of the authority.

[c] The grievance has to be his own beyond some grievance or inconvenience suffered by him in common with the rest of the public. The test is: can the person be said to be entitled to object and be heard by the authority before the authority takes the impugned action.

[d] The person has to be directly and immediately affected. An aggrieved party is one whose personal, pecuniary or property rights are adversely affected by another person's action or by a decree or judgment by a court.

[e] An appeal can be preferred from every original decree or from every decree passed in appeal. The appellant must be a person aggrieved by a decree nor merely by a finding. The person must be prejudicially or adversely affected by the decree. In other words, when a person is fastened with liability whereunder his property, of every type, is directly affected. To put it differently,is the person, by virtue of the decree, called upon to discharge a pecuniary liability so as to deprive him of his property. If the answer is yes, he is an

aggrieved person.

15.The case of the petitioner is that it has not executed the bond as a surety and the signatures of the two persons appear only in the capacity as witness. In support of the proposition attention was invited to Page No.4 of the bond wherein, in the first part the bond is signed and delivered by and on behalf of the importer, M/s. Golden Plastic Company, Proprietor, which is signed in presence of one Shri N.L.Talajia and Shri A.K.Bhatt. Thereafter, the column regarding surety appears and it was contended that there is no signature of any surety and the signatures of Shri Talajia and Shri Bhatt appear in the column of the witnesses. To emphasise the point, attention was invited to the copy of the bond in relation to Bill of Entry No.3 of 1995 wherein the earlier portion bears the signature of the proprietor of M/s. Golden Plastic Company on behalf of the importer and in the column for witnesses Mr.Naresh Talajia has signed. However, according to the petitioner, what is more

important is the portion that follows viz. the bond has been signed and delivered by and on behalf of the surety wherein on the left hand side the impression of rubber stamp for Lalbhai Trading Co. followed by “partner” appears, and between the two, signature of one Shri B.K.Bhatt appears which is witnessed again by Shri Naresh Talajia as a witness.

16. It was, therefore, contended on behalf of the petitioner that the authorities cannot fasten any liability on the petitioner because the petitioner was not a surety, having not executed any contract as required by law. Alternatively, it was contended that the Order-in-Original was bad in law as the same had been framed against the settled legal position. It was, therefore, urged that unless and until the petitioner is heard in the matter no liability of a third party can be fastened on the petitioner, and for the purpose, the petitioner was ready and willing to avail of and exhaust the statutory remedies provided under the Act.

17. As against that, it was submitted on behalf of the respondent authorities that the petitioner cannot be permitted to resile from the position of being a surety; that the petitioner had executed two bonds in relation to Bill of Entry Nos.3 of 1995 as well as 17 of 1995. That the bond had to be read as a whole. That the respondent authorities having acted on the terms held out by the petitioner it could not be permitted to turn around and deny its liability to discharge the liability which the petitioner had undertaken at the time when provisional assessment was framed and goods released in favour of the importer. It was hence contended that the petitioner could not be treated as an aggrieved person so as to be granted any statutory right of appeal. Alternatively, it was contended that in case the Court was inclined to permit the petitioner to agitate the disputed questions of fact regarding the petitioner being a surety or not being a surety, the respondent authorities must be permitted the right to cross-examine Shri Naresh Talajia and Shri A.K.Bhatt,

whose signatures appear in the last paragraph of the bond.

18. Taking up the last issue first it is necessary to note that the respondent authorities had preferred a separate application being Civil Application – For Direction No.7680 of 2005 with similar prayer and the same came to be disposed of by this Court vide order dated 14th September, 2005. The said application was rejected by observing as follows:

> "4. Without entering into any further discussion on merits of the matter, suffice it to state that the main petition viz. Special Civil Application No.14427 of 2005 is yet pending adjudication, the matter having been heard finally is awaiting judgment and order. Therefore, this application is, to say the least, premature and proceeds on a presumption that the Court shall decide the main petition in a particular manner. In the circumstances, the application is required to be rejected as being premature and presumptuous."

19. A brief resume of the law regarding surety may

be made:

(i) CHAPTER VIII of THE INDIAN CONTRACT ACT, 1872 (Contract Act) deals with INDEMNITY AND GUARANTEE. Sections 124 and 125 deal with indemnity while rest of the sections commencing from Section 126 upto Section 147 of the Contract Act, deal with law regarding guarantee. Section 126 of the Contract Act gives various definitions. “Contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called “the surety”; the person in respect of whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. Thus, a contract of guarantee is a tri-partite agreement between the principal debtor, creditor and the surety. It is well settled that the surety's liability is co-extensive with that of the principal debtor unless otherwise by special provision the liability is so varied. Thus, where the debt due by the principal debtor is scaled down the surety is liable only to the extent of such

scaled down amount. A contract of guarantee must necessarily involve three parties. In other words all the three parties should be privy to the contract if contract of guarantee is to be invoked. The person who wants to rely upon the contract of guarantee must prove the express participation or implied assent to such a contract. In absence of any liability there can be no contract of guarantee. The liability of the guarantor /surety presupposes the existence of a separate liability of the principal debtor and the liability of the surety is normally secondary which comes into existence only in case of default by the principal debtor. The definition under Section 126 of the Contract Act provides that a “contract of guarantee” is a contract to perform the promise, or discharge the liability of a third person in case of default by the third person; it is in essence a contract whereby the guarantor/surety agrees to be answerable for some liability of the principal debtor to the creditor. Therefore, where the surety or the guarantor is declared insolvent before default is committed by the principal debtor, creditor cannot seek any relief against the estate of the

surety in an anticipation of possible default by the principal debtor. Where the circumstances of default are such as to excuse the principal debtor from liability, the surety is also discharged from his liability. On the same principle, the surety is discharged when the contract by principal debtor is illegal or void. The surety's liability must be specifically proved against him and award or judgment against the debtor is no proof against the surety, nor are the admissions by the principal debtor sufficient to fix liability qua surety.

(ii) Under Section 126 of the Contract Act, there is no distinction between a contract of guarantee and a contract of suretyship since in express words the section lays down that the person who gives the guarantee is called the surety.

(iii) Section 133 of the Contract Act provides that where any variance is made in terms of contract between the principal debtor and the creditor, and the variance is made without the consent of the surety, the surety is discharged qua the transactions subsequent to variance.

(iv) Section 134 provides for discharge of surety by release or discharge of principal debtor. Similarly Section 135 of the Contract Act discharges a surety when creditor compounds with, gives time or agrees not to sue, the principal debtor.

(v) However, the requirement of tri-partite contract of guarantee is not satisfied in the case of surety bond executed in favour of the State or a department of the State. Strictly speaking such surety bond is given to the State or department of the State and not to the creditor. Therefore, in strict sense the terms of the provisions relating to contract of guarantee, with special reference to Sections 133 to 139 of the Contract Act cannot apply to a surety bond, but it is clear from various authorities that equitable principles underlying these sections would apply to a surety bond executed in favour of the State or a department of the State.

(vi) Similarly Section 141 of the Contract Act gives right to a surety to benefit of every security which the creditor has against the principal debtor. The principle underlying the rule that the

> surety is entitled, on payment of debt or performance of all that he is liable for, to the benefit of the rights of the creditor against the principal debtor and to be put in the same position in which the creditor in relation to principal debtor, is one of equity and does not rest upon the contract but on principle of natural justice.

20.In the present case, the petitioner has been called upon to discharge the liability which has been raised against the importer by Order-in-Original in the capacity as a surety. In the circumstances, can it be stated that the petitioner is entitled to challenge the Order-in-Original by way of an appeal? The position is required to be ascertained with reference to the provisions of statute in which the words “any person aggrieved” occur i.e. Section 128 of the Act.

21. The expression cannot be read to be rigid, exact and comprehensive. Apart from the content and intent of the statute, the specific circumstances of the

case, the nature and extent of the person's interest, and the nature and extent of the prejudice or injury that may be suffered by the person would be relevant factors. The Court is duty bound to act fairly in accordance with the principles of natural justice which have to be read into the statute where a person suffers as a result of unfair treatment on the part of the authority. Such a person can be said to be one who has suffered a legal grievance.

22. In the present fact situation, the petitioner is being fastened with a pecuniary liability which would deprive him of his property and whether such deprivation is wrongful or not can be adjudged only after the person is granted an opportunity of hearing. The approach of the respondent authorities that the Order-in-Original is only against the importer, that neither show cause notice was issued to the petitioner, nor was the duty confirmed or demanded from the petitioner in the said adjudication order and hence, the petitioner cannot be said to be a person aggrieved, if accepted, would result in meting out unfair treatment to the petitioner. The

petitioner is a person who is directly affected by the Order-in-Original upon default by the importer. If, as contended by the petitioner, the Order-in-Original is bad in law on merits, it would be travesty of justice if the petitioner is required to discharge the liability which the importer would not be required to discharge, in the event the importer had challenged the order in appeal. The position in law is well settled that the department is empowered to collect tax or duty only in the manner prescribed and after establishing that the levy is in accordance with the provisions of the Act. The revenue cannot levy any tax or duty de hors the provisions of the Act, and what it cannot legally levy cannot be permitted to be recovered on the specious plea of the demand being made against a surety.

23. The opening portion of Section 128 of the Act entitles any person aggrieved by any decision or order passed under the Act to prefer an appeal to the Commissioner (Appeals). Admittedly, the Order-in-Original is one which fastens pecuniary liability on

the petitioner. The section does not talk of the person against whom the order is made, but talks of 'any person aggrieved'. In other words, the person aggrieved may be any one other than the person against whom or in whose name the order is made. The qualification being, such other person must be aggrieved by such order or decision of the officer concerned. To put it differently, it could be any person who suffers a legal grievance resulting in wrongful deprivation of his property or wrongful refusal of something or wrongfully affecting such person's title to something. In other words, the person must suffer a legal wrong or injury. In the present case, out of various tests formulated by the Apex Court the petitioner can be said to be a party who is aggrieved by the order because the pecuniary or property rights of the petitioner are adversely affected by the Order-in-Original made by the proper officer. The petitioner is prejudicially or adversely affected by the Order-in-Original.

24.The reliance by the Commissioner (Appeals) on the

decision in the case of Northern Plastic Limited (supra) is misplaced. In fact the said decision supports the case of the petitioner. The said decision lays down that when the importer is called upon to pay the customs duty which, according to the importer, is not payable, the importer is certainly an aggrieved person who can prefer an appeal. In the present case, the liability of the petitioner, even as a surety, would be co-extensive with that of the importer and he steps into the shoes of the importer for all intents and purposes. If the importer is entitled to challenge the Order-in-Original by way of an appeal, on parity of reasoning the petitioner also would be equally entitled. As already stated hereinbefore, merely because the petitioner is a surety he cannot be called upon to discharge a liability which is not in accordance with law. And whether the liability is or is not in accordance with law can be established only in the event of the petitioner being permitted to exercise the right of appeal. Just as the importer is entitled to seek refund, if

the duty is illegally levied and recovered from the importer, the right of the surety would also stand on the same footing. This is not a case where the Order-in-Original contains only some adverse remarks against the petitioner so as to disentitle the petitioner from being treated as an aggrieved person. Thus the order made by the Commissioner (Appeals) is bad in law.

25. It is also necessary to take into consideration that the petitioner is also disputing its liability as a surety. Whether or not, the petitioner has executed the bond is an issue which requires leading of evidence and thereafter adjudication. In normal circumstances, such an issue would not arise. However, where the party who is termed to be surety denies the execution of the bond it would fall within realm of leading of evidence and proving of execution of document. In law “execution” means signing, sealing and delivery of a document. The term “execution” may be defined as a formal completion of a deed. It is the last act or series of acts which

completes it. Mere registration of a document is not in itself sufficient proof of its execution. Under Section 68 of the Indian Evidence Act, 1872 the proof of execution of document required by law to be attested is provided for. The concept of the term “attested” means that a person has signed the document by way of testimony to the fact that the said person saw it being executed. An attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment of the execution of the document by the executant. A document cannot be attested by a party to it.

26. Thus, in a case where the execution itself is denied and disputed by the party, namely, the petitioner, who is said to be the executant, the onus of proving the execution is on the party who alleges it, i.e. the revenue. The revenue will have to lead evidence in this connection. The present proceedings cannot be converted into original proceedings wherein evidence is led, by examination and cross-examination

of various persons. It should more appropriately be done before the adjudicating authority or the appellate authority who is empowered to record evidence. This is one more reason why the impugned order made by the Commissioner (Appeals) cannot be allowed to stand.

27. At this stage, it is necessary to note that on 1.4.2005 this Court had directed Commissioner (Appeals) to treat the appeal as having been filed within the period of limitation in case the appeal had been filed on or before 16/4/2005, and further directed that he “shall decide the same on merits in accordance with law”. When this was brought to the notice of the learned Counsel for the respondents the submission was that by virtue of the aforesaid direction contained in paragraph 5(ii) of the order made by this Court on 1.4.2005 in Special Civil Application No. 36 of 2005 the petitioner will not get a new right if the petitioner has no

right to file an appeal. This submission deserves to be stated to be rejected for the simple reason that the learned Counsel for the respondent authorities had categorically made a submission which came to be recorded in paragraph No.4 of the order dated 1.4.2005 by this Court :

> "Mr.Jitendra Malkan appearing on behalf of the respondents submits that the petitioner had already been served with a copy of the order at appropriate time and hence, the petitioner ought to have preferred the appeal within the prescribed period of limitation".

Therefore, the respondents cannot be permitted to now turn round and take a stand contrary to the position expressed in the earlier proceedings between the same parties.

28. Hence, the petitioner is held to be an

'aggrieved person' within the meaning of provisions of Section 128 of the Act. He has already preferred an appeal before the Commissioner (Appeals) which came to be dismissed vide impugned order dated 6/6/2005 (Annexure-A) only on preliminary ground of not being maintainable. Therefore, the said order dated 6/6/2005 made by Commissioner (Appeals) in Appeal No. 55 of 2005 is quashed and set aside and the appeal is restored to the file of Commissioner (Appeals), Ahmedabad for deciding afresh on merits after giving proper and reasonable opportunity of hearing to the petitioner.

29. The issue regarding execution of the bond and the dispute raised by the petitioner in relation to the said issue is at large and the Commissioner (Appeals) shall permit both sides to lead evidence in this regard. If necessary, it will be open to Commissioner (Appeals) to remand

the matter to the Adjudicating Authority for this purpose, because in relation to the goods imported under another Bill of Entry being 3 of 1995 the matter has been restored to the file of the Adjudicating Authority by CESTAT. In the view that the Court has taken it has not been found necessary to render any opinion as regards execution of the bond. Suffice it to state that prima facie, the petitioner seems to have made out a case in its favour, but this is subject to leading of evidence before Appropriate Authority by both the sides.

30.The operation of impugned notices dated 23/7/2004, 12/8/2004, 21/8/2004, 27/8/2004, 22/9/2004 and 19/11/2004 (Annexure 'B' colly.) shall be stayed till the appeal is heard and disposed of by Commissioner (Appeals) as directed hereinbefore. The petition stands disposed of accordingly. There shall be no order as to costs.

31.The petition is accordingly allowed in the aforesaid terms. Rule made absolute.

32.Before parting, it is necessary to record the assistance rendered by Shri T.U.Bhatt, learned Advocate as amicus curie.

Sd/- Sd/-
(D.A.Mehta, J) (H.N.Devani, J)

33 At this stage, after the judgment is pronounced, Mr.Malkan makes a request to stay the operation of the judgment. Considering the facts of the case the request is rejected.

Sd/- Sd/-
(D.A.Mehta,J) (H.N.Devani, J)

m.m.bhatt/katira